

June 9, 1999. In addition, claimant further argues he now has a psychological condition as a result of the work-related accident. Accordingly, claimant requests a finding of a 42 percent permanent partial functional impairment which combines the functional rating for his back with the functional rating for his psychological condition.

Conversely, respondent argues the Administrative Law Judge's Award is correct and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered a work-related accident on June 9, 1999. A co-employee accidentally dropped some cabinet fronts which struck claimant's low back. Claimant reported the accident to his supervisor and respondent referred him for treatment with Dr. Moorhead.

Dr. Moorhead examined claimant and noted tenderness but no bruising in the lumbosacral area. X-rays were taken and claimant was prescribed anti-inflammatory medication and physical therapy. Claimant continued working while he received treatment.

On July 5, 1999, claimant went to his personal physician, Bradley H. Barrett, M.D., complaining of back pain from the work-related incident on June 9, 1999. Dr. Barrett had treated claimant for low back complaints since 1990. The doctor noted claimant complained of pain in his left low back with weakness in his legs. The doctor specifically noted: "This has been a chronic complaint of his of course, twice we have done nerve conduction studies, once in 1990 and again in 1996, they were both normal." The doctor diagnosed chronic lumbosacral strain, gave claimant an injection of Demerol, noting it was for claimant's peace of mind as much as anything, and recommended claimant see a spinal specialist. However, the doctor also noted he was not sure there was anything wrong other than some muscle spasm which should get better.

Claimant was next referred by respondent to Philip Roderick Mills, M.D., and was examined on July 28, 1999. Based upon claimant's history of preexisting back problems and review of prior diagnostic studies, the doctor concluded claimant had a 5 percent preexisting impairment. The doctor imposed restrictions of lifting no greater than a maximum of 35 pounds. The doctor further noted claimant should change position as needed and lift using good body mechanics by avoiding twist and bend positions. Dr. Mills noted it was too soon to conclude claimant was at maximum medical improvement but he specifically determined that no further treatment was required. Instead claimant was encouraged to be on a walking program with regular back exercises. Lastly, the doctor

opined the injury on June 9, 1999, was a temporary aggravation of his preexisting condition.

Claimant did not request nor receive any additional medical treatment from respondent as a result of the work-related incident after the July 28, 1999, office visit with Dr. Mills.¹

Claimant was placed in a position sanding cabinets. On August 10, 2000, claimant was terminated from his employment with respondent after testing positive on a drug screen. Claimant asserts the drug was a prescription medication but he was terminated before he could produce the prescription. Claimant soon obtained other employment and continued working.

As a result of the work-related incident on June 9, 1999, claimant's current complaints are low back and left leg pain. He has tingling and numbness in his left leg. Claimant has increased pain after sitting for 20 minutes, standing for 45 minutes, walking a half block, bending, squatting, twisting, lifting, pushing and pulling. Claimant also has problems sleeping due to back pain and has problems with depression. Lastly, claimant contends he is unable to maintain an erection.

The claimant was referred by his attorney to Edward J. Prostic, M.D., for examination on July 28, 2000. X-rays revealed minor degenerative changes. Dr. Prostic noted claimant had poor range of motion and radicular symptoms. The doctor further noted claimant's symptoms were out of proportion to the objective physical findings and he suspected psychological decompensation. The doctor recommended a psychological evaluation. The doctor concluded he needed to review claimant's MRI before making any firm conclusions.

After review of the MRI, Dr. Prostic agreed the MRI did not show anything that would be causing nerve impingement. Claimant's attorney then requested an impairment rating and Dr. Prostic diagnosed claimant with a sprain and strain of his low back. Dr. Prostic opined the claimant has a 10 percent permanent partial impairment of the body as a whole on a functional basis for his low back injury which is based upon the AMA Guides, Fourth Edition.

The claimant was referred by his attorney to Richard Sweetland, Ph.D., a clinical psychologist. Dr. Sweetland saw claimant on two occasions because he was difficult to evaluate, had limited educational background and skills as well as limitations to his intellectual functioning. The doctor's report was dated January 29, 2001.

¹Dr. Barrett's medical records dated February 24, 2000, indicate claimant sought treatment complaining of pain and weakness in both legs as a result of pulling up some carpets. There is no indication this was a work-related incident. This is the only medical record which indicates claimant sought treatment for a condition in his back or legs after the July 28, 1999, office visit with Dr. Mills.

Claimant advised Dr. Sweetland about a back injury that had occurred 5 years ago which caused him considerable pain and discomfort as well as the most recent injury wherein a coworker dropped a stack of cabinets on his back. Claimant stated he had a reasonably active and normal sexual life prior to the first physical injury at work. The sexual problems also developed after the first injury. Dr. Sweetland understood claimant had ongoing pain after the first injury and had been suffering from depression since his first injury. The doctor's impression was the first injury was more significant.

Dr. Sweetland diagnosed claimant in the following manner:

Q. What was that diagnosis?

A. Well, basically my opinion was that this gentleman suffers from significant depression. However, his limited participation on several of the psychological tests indicated that he really needed ongoing psychotherapy in order to be definitive in your diagnosis. But he definitely has some serious emotional problems which I think would well be classified as major depression, or even being more conservative just saying mental disorder not otherwise specified.²

Dr. Sweetland concluded he would diagnose claimant as having a mental disorder not otherwise specified primarily due to the physical injuries in the back. Dr. Sweetland opined the claimant is 35 percent impaired in terms of his ability to function from a psychological standpoint. Dr. Sweetland's opinion was based upon the AMA Guides, Fourth Edition and the DSM IV (Diagnostic Manual for Mental Disorders) from the American Psychiatric Association.

Dr. Sweetland testified that there is no way to apportion any percentage of worsening or apportion his permanent impairment between the two accidents. The doctor felt the first accident was more significant than the second.

Patrick Lawrence Hughes, M.D., a board certified psychiatrist, performed an evaluation of the claimant on April 30, 2001, at the request of the respondent. Dr. Hughes testified the claimant denied any problems with appetite, concentration, crying spells, nervousness, anxiety, despair, hopelessness, or suicidal ideations. Since the claimant denied all of these symptoms, Dr. Hughes determined claimant does not have major depression.

Dr. Hughes diagnosed the claimant with pain disorder with psychological features only. It was the only identifiable psychiatric diagnosis he could make to a reasonable medical certainty. When later advised claimant had a permanent impairment rating, the

²Deposition of Richard D. Sweetland, Ph.D., dated July 2, 2001, at 25.

doctor amended his diagnosis to pain disorder with medical and psychological features. Dr. Hughes rated the claimant with a zero psychological impairment.

In proceedings under the Workers Compensation Act, claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various conditions on which the right depends.³

The Administrative Law Judge concluded the claimant suffered a temporary aggravation of his underlying low back condition and further adopted Dr. Hughes' opinion that any psychological problem claimant may have is not directly traceable to the June 9, 1999, incident at work. The Board agrees and affirms the Administrative Law Judge's decision.

It is well established under the Workers Compensation Act in Kansas that, when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁴

However, where work-related factors only produce a temporary increase in symptoms, this is not considered to be a permanent aggravating factor for the purpose of proving whether claimant suffered accidental injury arising out of and in the course of his or her employment.⁵

Initially, claimant concedes he had received prior treatment for low back complaints before the June 9, 1999, incident at work. However, claimant argues it was not until after the June 9, 1999, incident that his low back condition was diagnosed as chronic and restrictions were assigned. Accordingly, claimant argues this demonstrates a worsening of his preexisting low back condition as a result of the June 9, 1999, incident.

The record does not support the claimant's assertions. The claimant's personal physician, Dr. Barrett, not only had treated claimant for low back symptoms beginning in 1990, but also had diagnosed claimant with chronic lumbosacral strain as early as December 1992.

Although Dr. Barrett did not impose restrictions until after the June 9, 1999, incident, he did so then at claimant's request. It is significant to note that Dr. Barrett specifically testified he had discussions with claimant about work restrictions but claimant did not want the doctor to impose restrictions because he was afraid he would lose his job. Although

³See K.S.A. 44-501(a) and K.S.A. 44-508(g).

⁴Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

⁵See West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561, 859 P.2d 382 (1993).

the doctor could not recall when the discussions took place, the logical conclusion is they occurred prior to the June 9, 1999, incident because claimant finally requested and received work restrictions from Dr. Barrett after his office visit with the doctor regarding the June 9, 1999, incident.

After seeing the claimant on July 5, 1999, Dr. Barrett noted he was unsure claimant had anything wrong other than some muscle spasm which should improve with time. When Dr. Mills examined claimant on July 28, 1999, he concluded claimant had suffered a temporary aggravation. Claimant continued working for respondent for over a year after his office visit with Dr. Mills. During this time period claimant neither requested nor received any further treatment for the effects of the June 9, 1999, incident.⁶

Claimant next argues Dr. Mills' opinion should be disregarded because on the one occasion when the doctor examined the claimant, the doctor noted claimant was not at maximum medical improvement. This was because Dr. Mills examined claimant just a little over one month after the incident. Nevertheless, although he noted claimant was not at maximum medical improvement, after examining claimant the doctor concluded no further treatment was required and he expected claimant to fully recover from the temporary aggravation. As previously noted, claimant continued working with respondent for over a year after his accident without any additional medical treatment for his low back. This corroborates the doctor's opinion claimant only suffered a temporary aggravation of his preexisting low back condition.

The Board adopts the Administrative Law Judge's finding that the preponderance of the evidence does not support the claimant's assertions that he suffered a permanent worsening of his low back condition as a result of the June 9, 1999, incident at work.

The Administrative Law Judge adopted Dr. Hughes' opinion that claimant did not suffer any psychological impairment as a result of the work-related incident. The Board agrees that Dr. Hughes' opinion is more persuasive than Dr. Sweetland.

As the Judge noted, the claimant's medical history indicated many, if not all, of his psychological complaints predated his injury on June 9, 1999. In addition, claimant advised Dr. Sweetland that his sexual dysfunction and depression arose after a prior low back injury in 1995. However, when Dr. Hughes examined claimant, he attributed all of his problems to the June 1999 incident. Although claimant complained of sexual dysfunction, he had not followed up on Dr. Barrett's suggestion that he try Viagra. Moreover, as noted by the Administrative Law Judge, there was mention in the medical records of claimant's

⁶ Claimant argues in his brief that he received additional physical therapy after seeing Dr. Mills. Dr. Mills records indicate that after seeing claimant the doctor did not recommend or prescribe any further treatment. Claimant was asked whether he went through another course of physical therapy before receiving Dr. Mills' restrictions. Claimant testified the doctor gave him some exercises to do. Dr. Mills did not prescribe additional physical therapy.

complaints of pain with sexual intercourse. At the same time claimant complained he was impotent. Accordingly, the Board affirms the Administrative Law Judge's decision claimant failed to meet his burden of proof that he suffered any permanent psychological impairment as a result of the work-related incident on June 9, 1999.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated October 25, 2001, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of May 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Joseph C. McMillan, Attorney for Respondent
Roger E. McClellan, Attorney for Respondent
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director